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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x  
4 UNITED STATES OF AMERICA,

v.

16 Cr. 91 (PKC)

5 SCOTT TUCKER and TIMOTHY MUIR,

6 Defendants.

Conference

7 -----x  
8 New York, N.Y.  
9 March 9, 2017  
10 11:58 a.m.

12 Before:

13 HON. P. KEVIN CASTEL,

14 District Judge

## 15 APPEARANCES

16 PREET BHARARA

17 United States Attorney for the  
18 Southern District of New York19 BY: NIKETH V. VELAMOOR, ESQ.  
20 Assistant United States Attorney

21 FREEMAN NOOTER &amp; GINSBERG

22 Attorneys for Defendant Scott Tucker

23 BY: LEE A. GINSBERG, ESQ.

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25 Attorneys for Defendant Scott Tucker

BY: NADJIA LIMANI, ESQ.

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BY: THOMAS J. BATH, JR., ESQ.

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BY: MARC A. AGNIFILO, ESQ.

25 ALSO PRESENT: RANDALL PRAISWATER, IRS Special Agent  
JERRY WHITTEN, IRS Special Agent

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1 (Case called)

2 THE DEPUTY CLERK: For the government?

3 MR. VELAMOOR: Good morning, your Honor. Nik Velamoor  
4 for the government. I'm joined at counsel table by Special  
5 Agents Jerry Whitten and Randall Praiswater from the IRS  
6 criminal investigation division.

7 THE COURT: All right. Thank you, Mr. Velamoor, and  
8 good afternoon.

9 And for the defendants?

10 MR. GINSBERG: Your Honor, good morning. For  
11 Mr. Tucker, Lee Ginsberg and Nadjia Limani. We also have in  
12 the audience Beverly Van Ness, who's been working on the legal  
13 motions, and Eli Salomon-Abrams, who's our paralegal who's been  
14 working on productivity and trying to obtain documents.

15 Mr. Roth had a previous engagement, family engagement out of  
16 town, so he's not able to be here today.

17 THE COURT: All right. And Mr. Tucker is with us  
18 today.

19 MR. GINSBERG: Mr. Tucker is seated at counsel table,  
20 yes, your Honor.

21 THE COURT: All right. And for defendant Muir?

22 MR. BATH: May it please the Court, Mr. Muir appears  
23 in court with counsel, Mark Agnifilo and Tom Bath.

24 THE COURT: Welcome to you as well.

25 So to set the stage, there were a series of subpoenas

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1 tendered *ex parte* to the Court February 9. The Court reviewed  
2 them, issued an order, explaining its reasons for not executing  
3 the subpoenas. That was the order filed on February 16, 2017.

4 Thereafter, on February 17, Mr. Ginsberg timely moved  
5 for the Court to reconsider. I ordered the government to  
6 respond, which the government has responded, and Mr. Ginsberg  
7 has replied.

8 Now there are a lot of things that are not apparent to  
9 me from the submissions, but what I hear from the government is  
10 that there are five payday lending entities that are raised in  
11 the indictment and that the government has obtained the  
12 financial and business records of the entities involved in the  
13 charged enterprise and provided them to the defendants almost a  
14 year ago, or exactly a year ago, a year ago yesterday, and that  
15 there is a substantial overlap between that which the defendant  
16 seeks and that which has already been produced, from what I can  
17 gather, and the government also notes that it's received and  
18 disclosed extensive borrower spreadsheets for each of the five  
19 payday lending entities, and while it's true that their  
20 production does not go as far as December 31, 2016, the  
21 indictment, says the government, only charges conduct through  
22 August 2013.

23 They also note that with regard to flow of money, the  
24 government says that the indictment alleges -- and I'm not sure  
25 that there's any dispute on this because I think it's the point

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1 that the defense was seeking to establish -- that funds from  
2 the payday lending enterprise flowed into bank accounts held in  
3 the name of the Indian tribe.

4 So there may be something here that I'm not  
5 understanding, but I hadn't a clue of any of this from the  
6 defendants' submissions and from reviewing the subpoenas at  
7 all. Are the government's assertions correct, Mr. Ginsberg, or  
8 are they making this up?

9 MR. GINSBERG: Well, they're certainly not making it  
10 up. I'm not accusing them of making it up. The government's  
11 assertions are generally correct. We just had a meeting before  
12 your Honor came out, and largely the problem that I think we've  
13 been facing is that the way the material came to the government  
14 from their original subpoenas and the way that the government  
15 then put that material into some form, format, and then it was  
16 eventually turned over in discovery makes it extremely  
17 difficult for us to locate the documents, because we're talking  
18 about hundreds of thousands or millions of documents, and even  
19 narrowing search terms doesn't get us to the material that we  
20 wanted to receive by way of subpoena. The government has now  
21 told us they think, for a large amount of that material, they  
22 may be in a position to assist us by speaking to members of my  
23 staff to sort of pinpoint within the discovery where a lot of  
24 this material is. If they're able to do that, it may obviate  
25 many of the subpoenas, not all of the subpoenas. Some of the

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1 subpoenas may still have to be issued.

2 The government has told us, for example, that some of  
3 the banks were only involved for relatively short periods of  
4 time. They may have all those records, they may not. But we  
5 need to be certain. And the government candidly admitted just  
6 because they received them and they're going to tell us where  
7 it is in the discovery, doesn't mean we have to accept  
8 everything that they tell us and not try to go further.

9 So I think at this point -- and I'm sorry if it wasn't  
10 clear in the letters. We tried to make it clear in our first  
11 letter when your Honor denied the issuance of the subpoenas. I  
12 tried to make it even clearer in my response. We knew part of  
13 it was a product of our ability to search and find, but this is  
14 a massive -- this is not like a case where there's maybe 500  
15 documents. It literally took two weeks at one point to locate  
16 a handful of documents that we needed for a particular entity,  
17 and we realized if we continue on that path, we're never going  
18 to have the material. It may be that we can now speed those  
19 things up and limit the number of subpoenas that we ask the  
20 Court to review and to issue.

21 Another part of this, however, going beyond the  
22 financial -- or before I skip over that, the reason that we  
23 wanted the financial records going past the date of the  
24 indictment is that from everything we understand from our  
25 discussions with the government and from the indictment, the

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1 government's general position is that the tribes never had  
2 control or ownership of the monies in the sense or the fact  
3 that they were not the lenders and that they didn't own that  
4 portion of the operation, and if that's the case, factually,  
5 then we can't make our argument, our legal argument that if the  
6 tribes were the lenders, there's a sovereign immunity issue. I  
7 understand that. Our view is that, to the extent that at least  
8 the Miami tribe, which has reached a nonprosecution agreement  
9 with the government and was allowed to keep many millions of  
10 dollars -- and we're not sure of that exact figure, but the  
11 nonprosecution agreement required them, it's my understanding,  
12 or other terms related to that agreement require them to  
13 forfeit certain amounts of money and they were allowed to keep  
14 certain amounts of money. Our view is that they continued  
15 operating even after the date of the indictment and the  
16 nonprosecution agreement in a way that was consistent with the  
17 way they were operating when they were still involved with our  
18 client and entities that were involved with our client, which  
19 we believe is relevant and would demonstrate their ownership  
20 and control of the lending portion of the operation. The  
21 grossest example I could give of that is, if they were  
22 permitted to keep \$30 million, let's say, as a result of their  
23 reaching the nonprosecution agreement, the government says,  
24 well, you can keep \$30 million and you have to forfeit X, then  
25 that money that they kept, they had as a result of their gains

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1 as the lenders in this payday lending operation would be  
2 particularly relevant to what role they had played all those  
3 years up until the date of the indictment and may still be  
4 playing, although now not involved with our client. So --

5 THE COURT: Well, you say it may be relevant, and  
6 today is not necessarily the day to decide issues like that.

7 MR. GINSBERG: Only to address that extra period of  
8 time --

9 THE COURT: I understand.

10 MR. GINSBERG: -- why after 2013 we still --

11 THE COURT: Fair enough. But I guess what comes to my  
12 mind is the question as to whether the conduct of the  
13 defendants during the time period alleged in the indictment was  
14 lawful.

15 MR. GINSBERG: Correct.

16 THE COURT: Whether the tribe or tribes are engaging  
17 in conduct today in which other people are engaging in unlawful  
18 activity or lawful activity is beside the point. It's not fair  
19 game to say anything which is not charged in this indictment is  
20 perfectly lawful activity so if it goes on today unindicted,  
21 that's the gold standard of what you're allowed to do. That  
22 doesn't, of course, work, and I don't think you're urging that.

23 MR. GINSBERG: No, I'm not. I'm not urging that. I'm  
24 urging that it might very well show a continual pattern of  
25 operations of the business that existed in 2011, 2012, 2013,

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1 and after a nonprosecution agreement, after indictment, it was  
2 exactly the same, which I think would be relevant and could and  
3 would establish for us that at all times the tribe was in  
4 control and ownership of the lending. So we don't even know in  
5 the first instance without the records that postdate the  
6 indictment whether that's even a fact. All we know is, they  
7 were permitted to keep some amount of money. What theory the  
8 government believed they were entitled to it, whether the  
9 government believed that they were entitled to keep that money  
10 because they had earned that money from being involved in the  
11 operation generally or from being the lenders, we don't know  
12 that. And so that is important to us. It may turn out that it  
13 becomes an issue that's not relevant. And your Honor is  
14 correct. We can't stand up at trial and argue, because they're  
15 now operating in a lawful or even unlawful way, the government  
16 couldn't argue that that is in fact what occurred prior to the  
17 date of the indictment. But without the information, we're not  
18 in a position to even begin to determine whether we can make  
19 that argument and whether it's a sound argument and whether the  
20 Court would be in a position to rule whether it's relevant to  
21 show how they continued on after the date of the indictment or  
22 after the nonprosecution agreement. So that only addresses  
23 that additional portion of time that postdates the indictment.  
24 But beyond that, in the subpoenas, we are also asking for  
25 various records of the tribes, not necessarily the financial

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1 records but internal documents of the tribes, and the reason  
2 for that is that, at least pointing to the Miami tribe, they  
3 reached a nonprosecution agreement, and we have a good-faith  
4 reason to believe, based upon conversations with witnesses and  
5 reviewing certain documents, that although a nonprosecution  
6 agreement was signed, there are members of that tribe who were  
7 involved in the same operations prior to 2013, during the time  
8 that the criminal activity is alleged to have occurred, who had  
9 the belief, and may still have the belief, based upon their  
10 participation, that what they were doing was in fact lawful and  
11 that they were the owners and the lenders, and we believe that  
12 that's contained in material that's controlled by the tribe.

13 There's a separate issue which we may have to brief,  
14 which is, even though the tribe reached a nonprosecution  
15 agreement with the government, the government is telling us --  
16 and the lawyer for the tribe may attempt to assert  
17 attorney-client privilege as to some of those documents, or  
18 other things of that nature, which may need to be litigated,  
19 because our view is, if they reached a nonprosecution agreement  
20 and there is a limited waiver of the attorney-client privilege  
21 that we're aware of and were given a copy of, we should have  
22 the rest of the documents and not be limited, so that if a  
23 witness from the Miami tribe testifies at trial and says, it  
24 was my view at all times that what we were doing was not legal  
25 and therefore, given the opportunity, I reached a

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1 nonprosecution agreement on behalf of the tribe, for the tribe,  
2 but there are others who are on the board of directors who took  
3 differing views and those views are contained in materials that  
4 were kept by the tribe, we should be able to have those,  
5 because it may well be material that we would be able and  
6 permitted to use for impeachment purposes.

7 So that's a separate segment of some of the subpoenas.  
8 It's a smaller, probably smaller number in terms of the  
9 documents we're talking about, but it still is something  
10 separate and apart from what the government may have and may be  
11 able to point us to in discovery.

12 So I hope that gives a better picture to your Honor as  
13 to why each portion of the material we requested was put into  
14 the subpoenas. Based upon our conversation this morning, I  
15 think what I would suggest to the Court is that we be given a  
16 period of time -- and we'll have to do this quickly -- to work  
17 with the government and to see if they can point us directly to  
18 most of these financial documents, and we can obtain them from  
19 the discovery that we do have. To the extent that we cannot  
20 locate those documents, which for sure would include  
21 postindictment documents and the tribal corporate documents, if  
22 you will, of all the record materials, we would still like to  
23 either resubmit or have your Honor reconsider subpoenas as to  
24 that material, and we will move quickly on the material that  
25 the government helped us with so that if it turns out we still

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1 don't have everything we need, we can come back to the Court  
2 and say, the government helped us, we found 75 percent of the  
3 material, but we still are missing a certain percentage and we  
4 would like the Court to issue a Rule 17 subpoena so that we can  
5 get the balance of the subpoenas. Of course the government's  
6 view of the value of the material, in our view, is different,  
7 and the government can, as it conceded earlier today, you know,  
8 they had no reason to know exactly how we were going about  
9 preparing our defense, and when the subpoena issue -- even  
10 though we have had many conversations. The Court should know,  
11 this case has not moved along in a vacuum. There have been  
12 many telephone calls, there were in-person meetings to try to  
13 sort out some of the thornier issues. But it may turn out that  
14 there are things that the government now realizes they didn't  
15 obtain that we want and why we want it, and then it will be a  
16 determination for either the Court to issue the subpoena or, if  
17 the Court does issue the subpoena and we obtain the materials,  
18 then there will be an issue of relevance at trial and so forth.

19 But that's how I would suggest we proceed. It would  
20 be foolish for us -- not just foolish, but I don't think the  
21 Court would be happy if we turned down the offer from the  
22 government. But we still need to move quickly because the  
23 trial date is not far off, and I didn't read your Honor's  
24 request to have this conference to open the door to my  
25 application again to move the trial date, but that still exists

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1 in our mind. I know what your Honor's ruling was, but even if  
2 we're pointed to these documents and it turns out that there  
3 are tens and tens of thousands of documents, we then can  
4 present them to the forensic accountant and his staff to try to  
5 prepare for us what we believe we need and get an opinion from  
6 them in a timely fashion so that we can absorb it, so that he's  
7 in a position to testify if we need to, and so that we can use  
8 it during the course of the trial. We haven't yet put in an  
9 additional letter for reconsideration of that. I'm well aware  
10 of the Court's view on trial schedules. But the Court also  
11 knows -- and I'm only speaking for myself here -- I'm not one  
12 to shy away from a trial or trial date just to do that. I  
13 don't just come in and say, put it off for four months, because  
14 I'm going to go lie on a beach someplace. I love trying cases,  
15 and I try a lot of them. I just finished last week --

16 THE COURT: You've tried two before me.

17 MR. GINSBERG: I've tried two before you.

18 THE COURT: And neither one of them were particularly  
19 short trials. The first one was a long one; the second one was  
20 several weeks, at least.

21 MR. GINSBERG: Oh, more than that.

22 THE COURT: Both of them were pretty long, yes.

23 MR. GINSBERG: Yes. So I know the Court understands  
24 that I'm not doing this, we're not doing this, for purposes of  
25 delay. We're doing this because we have clients to represent.

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1 And I should mention, when the government says that there was  
2 prior counsel involved, and there was, up until, to begin with,  
3 June, when Jim Roth was appointed, and then I was brought in  
4 and the rest of my staff was brought in, we tried to get up to  
5 speed as fast as possible. The fact, frankly, that prior  
6 counsel either didn't think it was necessary or didn't perceive  
7 the fact that they would be unsuccessful in convincing the  
8 government not to bring an indictment and would need to have  
9 all of these documents available in order to go to trial if  
10 that were to happen, while it's not the best thing in the world  
11 for us, I don't think we should suffer, nor do I think the  
12 client should suffer for the fact that nobody, six months ago  
13 or eight months ago or a year ago, recognized that this  
14 material might be important or relevant and could have gone  
15 about trying to obtain it at an earlier date. Certainly I  
16 guess the earliest probably would have been right after the  
17 indictment. It would have been a little harder to try to  
18 obtain this material prior to the indictment. But we're living  
19 in the world that we inherited, and we're moving as fast as we  
20 can.

21 THE COURT: All right. Let me hear from the  
22 government.

23 MR. VELAMOOR: Thank you, your Honor.

24 Let me just discuss a few of the points. I won't  
25 address them all.

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1                   In terms of the discovery, I think the government has  
2 acknowledged from the beginning that the discovery was  
3 voluminous. But I don't want the record to reflect or be  
4 allowed to be interpreted as we just dumped millions and  
5 millions of pages in a completely unorganized fashion. We did  
6 not do that. We produced discovery organized by the producing  
7 party. Where there were no Bates numbers, we added them with  
8 all the documents.

9                   And so for example, we produced documents from each of  
10 the banks that are named in the defense subpoenas, organized by  
11 bank, and with Bates numbers. So I think these things have  
12 been provided.

13                   I'm certainly sympathetic to the notion that it's  
14 voluminous. Sympathetic in part because it has been our task  
15 to go through them as well, and it was a task. But I don't  
16 want to leave the impression that we didn't provide some kind  
17 of a roadmap, including an index, to the defense to go through  
18 that. But we will, of course, you know, help them navigate  
19 these things going forward, as we've done before.

20                   In terms of the remaining scope of the subpoenas, we  
21 do believe that the scope of what the defense needs is going to  
22 be narrowed substantially. I think that's in part because I  
23 think we entered on, you know -- tried to do the same thing  
24 that they're trying to do, which is trace the money, and so as  
25 a result of that, we were led to some of the same financial

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1 institutions and to request some of the same documents, and we  
2 requested very broadly documents from these financial  
3 institutions, so I do believe that since we're trying to do the  
4 same thing as they appear to be trying to do, that we're going  
5 to have a lot of these documents. The agents have prepared a  
6 spreadsheet overlapping what they've requested and the date  
7 ranges of what we've obtained and provided, so I think we're  
8 going to be able to help them do that. Obviously the  
9 production from the main tribe, named tribe, is bigger and is  
10 somewhat harder to navigate because it's from one producing  
11 party, so many documents, but we've discussed some ways that we  
12 can help them do that today. I plan to turn over to them the  
13 production letters that we got from AMG, which in some ways  
14 describes by Bates range, which Bates range refers to which  
15 specific document requests from our subpoena. So for example,  
16 our subpoena had a request for financial statements. Their  
17 letters say: With respect to your request, number one, for  
18 financial statements, these are Bates ranges. Perhaps that can  
19 help them do that. We'll identify some of the other documents  
20 as well.

21 It seems like where we're likely to be focusing in the  
22 end, I think, are documents from these financial institutions  
23 beyond the dates that we obtained them, and as well as these  
24 internal discussions to the Miami tribe concerning their entry  
25 or discussions about entering into an agreement with the

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1 government. So we just address those two issues.

2 In terms of the time frame after the indictment, I  
3 don't think that time frame is going to be very broad, because  
4 we obtained records after the time frame of the indictment.  
5 I'm sure it comes as no surprise to the Court that we were  
6 interested in tracing the money and making sure that money we  
7 believed were proceeds were not dissipating or disappearing  
8 when we fully intended to forfeit and freeze money as part of  
9 the case, so we continued to obtain bank records well after the  
10 indictment, and in many cases up until the beginning of 2016.  
11 It's true we stopped doing that when we indicted, in part  
12 because, you know, we entered the same orders freezing some of  
13 these accounts at that point. So I think to the extent they  
14 need records after the indictment, they're going to have a lot  
15 of what they need already and have had it. So I don't think  
16 there's going to be a lot of that.

17 I'll take the cue from the Court in terms of arguing  
18 about whether some of these arguments are relevant. We  
19 certainly have views on those things, both in terms of whether  
20 or not the arguments are right and whether or not some of the  
21 factual assertions are consistent with our understanding of the  
22 facts, but I'll leave that aside.

23 In terms of the internal documents of the tribes  
24 concerning their entry into an agreement with us, you know,  
25 first of all, I don't believe -- and I think it's quite clear

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1 that the state of mind of tribal people as to whether or not  
2 they believed they were acting lawfully, even assuming some of  
3 them did, I don't think it's relevant here. We have made a  
4 motion *in limine* regarding that in terms of other people's  
5 state of mind is not relevant. What's relevant is the state of  
6 mind of the defendants, whether or not they believed they were  
7 acting lawfully in part based on the advice that they were  
8 given. I think the Court has become aware of some of that  
9 advice.

10 To the extent that the defense is ultimately seeking  
11 subpoenas for the purposes of impeachment, I think there is  
12 case law out there that makes clear that Rule 17 subpoenas are  
13 not appropriate solely for impeachment material. And so to the  
14 extent it boils down to that, you know, we'd ask for an  
15 opportunity to provide some of those cases to the Court if the  
16 Court needs them, but ultimately this is going to be an  
17 exercise in obtaining impeachment material. I don't think  
18 Rule 17 subpoenas are appropriate for that, even leaving aside  
19 the fact that there are likely to be privilege issues anyway,  
20 so it would preclude any kind of substantial production for  
21 that.

22 I'm not sure if there's been a new request to adjourn  
23 the trial at this point. I think we're going to want to be  
24 heard on that. If the Court's entertaining such a request,  
25 we'd like to go forward. We think we should go forward in

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1 April. We're prepared to go forward.

2 THE COURT: Let me ask you a question.

3 MR. VELAMOOR: Sure.

4 THE COURT: When I scheduled this conference, I had no  
5 idea that the government was going to file a motion under the  
6 crime-fraud exception to the attorney-client privilege for a  
7 swath of documents. Maybe you could tell me where this motion  
8 arises at this juncture.

9 MR. VELAMOOR: Fair enough. As we're preparing for a  
10 trial, we're reviewing documents more intently, we're  
11 exploring, you know, what some of our theories are, where there  
12 may be additional evidence out there. We had some initial  
13 discussions with the law firm about producing to us  
14 nonprivileged material. We've not received any response from  
15 that. I think they're waiting for some kind of perhaps  
16 permission from the defendants to do that. But this was,  
17 frankly, as we prepared, an idea that, you know, came to us as  
18 we prepared, and so we filed it as soon as we could. I don't  
19 expect it to result in any large amount of documents  
20 whatsoever, and so --

21 THE COURT: So, look, Mr. Ginsberg correctly referred  
22 to my reluctance to move a set trial date, particularly where  
23 there's been a trial date set and moved already. The Court has  
24 to be open-minded and, you know, I would never say never on  
25 adjournments.

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1                   Why isn't the way that the Court should proceed as  
2 follows -- have a seat and you can both argue with me after you  
3 hear what I have to say. Between today and March 22<sup>nd</sup>,  
4 defense counsel and the government would work to get to the  
5 bottom of what defense thinks it doesn't have but the  
6 government thinks the defense does have, and essentially have  
7 the ability to drill down to what are the essentials of the  
8 scope of any trial subpoena. Following the completion of that  
9 exercise, by March 30<sup>th</sup>, the defense would do the following:  
10 file a brief, a letter brief in support of its subpoenas,  
11 including the actual text of the proposed subpoenas; also on  
12 March 30<sup>th</sup>, it would file its opposition to the government's  
13 motion under the crime-fraud exception; April 14<sup>th</sup>, the  
14 government would respond -- that's two weeks after March 30 --  
15 to the defense position on the Rule 17 subpoenas; and the  
16 government would also reply on its motion on the crime-fraud  
17 exception; and on April 21, the defendant can put in whatever  
18 it wants in reply on the trial subpoena issue.

19                   If subpoenas are going to be issued, if they were  
20 issued today, it's questionable in my mind -- and it's playing  
21 this out to kind of the brink of trial, to see whether or not  
22 the recipient of the subpoena has an application to make before  
23 me for me to deal with that application and to rule. It just  
24 seems to me that what I'm now faced with -- or maybe I'm now  
25 understanding what I'm faced with and maybe the argument is

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1 I've been faced with this since the moment I received the  
2 subpoenas. I don't know.

3 Now I also have the government's crime-fraud motion.  
4 It seems to me that I should seriously consider moving the  
5 trial date to allow those things to happen, including, if I  
6 issue the subpoenas on or about April 24<sup>th</sup> or so, I have to  
7 give the parties upon whom they're served an opportunity to be  
8 heard, if they wish to be heard. I don't know what arguments  
9 they're going to raise, whether they're privilege arguments or  
10 whether they're sovereign immunity arguments or the like. But  
11 that has to be built into this as well.

12 Why is that not the way I should proceed?

13 First of all, let me hear from Mr. Ginsberg, and then  
14 I'll hear from the government.

15 MR. GINSBERG: I think that's exactly the way the  
16 Court should proceed, and I think although maybe we wrote our  
17 initial letter in a clumsy or not terribly clear fashion, now  
18 that your Honor has seen the other presentations and heard the  
19 argument, I think your Honor completely understands the  
20 position that we're in, and I think it would be appropriate to  
21 move along that schedule, because that way it will give  
22 everybody the opportunity to resolve these outstanding issues,  
23 to have the material, to be prepared for trial. And I don't  
24 know if the government's going to argue prejudice, but I don't  
25 think this is a typical kind of case where an adjournment of

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1 the trial would lead to prejudice. I think the kinds of  
2 witnesses that we're going to have in this trial can testify at  
3 other dates, and if your Honor's schedule can accommodate us at  
4 another date, we certainly will make ourselves available.

5 THE COURT: Let me hear from Mr. Velamoor.

6 MR. VELAMOOR: Absolutely. So I focused today on the  
7 fact that we think that the defense has, you know, essentially  
8 all the documents that they need. The government still doesn't  
9 think that they've identified any particularly relevant reason  
10 why they are likely to recover anything new or anything  
11 different from any of these Rule 17 subpoenas, even if such  
12 subpoenas turn out to be appropriate down the line. I think,  
13 as the Court pointed out at the outset of today's conference,  
14 the original indictment alleged that these bank accounts were  
15 nominally in the names of the tribes and Tucker sold them.  
16 That has been part of the government's theory since the case  
17 was initially charged in March.

18 THE COURT: So just to cut to the chase here, your  
19 position is that I should deny the motion to reconsider on the  
20 subpoenas, that as an officer of the court and a prosecutor  
21 with your own ethical responsibilities, you're happy to work  
22 with defense counsel in identifying documents, but there is  
23 nothing here that should be the subject of a subpoena, period.  
24 Is that your position?

25 MR. VELAMOOR: Essentially, yes. I think, you know,

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1 at this stage, for a variety of reasons, we don't see a basis  
2 for additional subpoenas at this point, and --

3 THE COURT: Well, you say "at this point." That's the  
4 problem that the Court has. I understand "at this point." But  
5 what has been posited here, which is not unreasonable on  
6 anyone's part, is that there should be a timeout of some sort  
7 so that the government can show the defense that some of their  
8 assumptions about what's been produced already is not as dire  
9 as they made it out to be and that you may be of some  
10 assistance in their locating appropriate documents. That's  
11 what I understand. And implicit in what you're saying is, at  
12 the conclusion of that process, one will know better what it is  
13 that may appropriately fall within Rule 17. Yes? Isn't that  
14 really what you're saying?

15 MR. VELAMOOR: That's true. I think part of what  
16 we're saying is that, you know, of course we recognize our  
17 obligations as an officer of the court. We're the government.  
18 We're a different litigant. And that's why we're happy to help  
19 assist at this stage. But it almost seems like our offer to  
20 help is now -- we've tossed it in an adjournment that, frankly,  
21 on its merits, I don't think is appropriate here, given the  
22 fact that they have had these documents for a long time.

23 THE COURT: No. But the consequence, Mr. Velamoor, of  
24 your argument is, really, what I have to be prepared to say is,  
25 no subpoena now, no subpoena ever, ever, no matter what happens

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1 as a result of the discussions that the government has with  
2 defense counsel, and now knowing a bit more, I'm reluctant to  
3 do that. And once I say I'm reluctant to do that, then I have  
4 to construct a process which is orderly to decide if there's  
5 anything.

6 Now, I don't know, call me crazy, but it could happen,  
7 I suppose, that after you sit down with defense counsel,  
8 Mr. Ginsberg says, why, that was extremely helpful and now  
9 there's not a possible thing that I can get a subpoena for or  
10 want a subpoena for and so the whole thing evaporates. I got  
11 that. What you're urging here is I have some sort of a more  
12 accelerated schedule on this and a more accelerated schedule on  
13 your crime-fraud motion? Is that what you want me to do? And  
14 write a decision next week, while I'm trying the Walters case,  
15 on your crime-fraud motion?

16 MR. VELAMOOR: Well, certainly what I'm not going to  
17 do is call the Court crazy. That we can be confident of. What  
18 I was going to suggest, though, is that I do think that some of  
19 these things could happen on a faster schedule, at least on the  
20 part of the parties. I don't --

21 THE COURT: Listen, the thing is, we could shave days  
22 off. I got that. But I can't get to a schedule that has all  
23 the issues resolved, it seems to me, by April 17<sup>th</sup>, when the  
24 sun rises on the morning of April 17<sup>th</sup>. That's what appears  
25 to me. And listen, I'm not here to throw rocks at the

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1 defendants or to throw rocks at the prosecution. I know things  
2 happen in life. But the reality is, I certainly didn't know  
3 that I was going to get a crime-fraud exception motion plopped  
4 on my desk.

5 The only client at issue on this is Mr. Tucker, is  
6 that correct? No one else has an attorney-client privilege at  
7 issue here?

8 MR. VELAMOOR: I mean, that's certainly my  
9 understanding. You know, if Mr. Muir also was a client of that  
10 firm, then that would be news to me, but that's certainly not  
11 what I understand to be the case.

12 THE COURT: All right. Okay. But in any event, it  
13 seems to me that what I'm proposing is the proper way to go.  
14 Now if you want to tell me something about something unusual on  
15 prejudice, I'm all ears. Tell me what it is. Do you have  
16 somebody who's about to die? Do you have somebody who's going  
17 to flee the jurisdiction? Do you have someone of singular  
18 importance who is only available on April 18<sup>th</sup> and will not  
19 be available again?

20 MR. VELAMOOR: I don't think I have an argument like  
21 that.

22 THE COURT: All right. So I think the thing to do is  
23 to go with the schedule which I've outlined. I hope everybody  
24 took notes. You can buy a copy of the transcript. It's there.  
25 It is the schedule.

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1                   And now let me set about the process of setting a  
2 trial date in this case.

3                   I could set it realistically to start at a point in  
4 time in the month of June or I could put it over to early  
5 September, the Monday after Labor Day. Let me hear from the  
6 government and let me hear from defense counsel on those. So  
7 let's say June 19<sup>th</sup>. I have a civil case on that day. I  
8 would have to move it. But June 19<sup>th</sup>. And failing that, it  
9 would be September 11<sup>th</sup>, which is a Monday.

10                  MR. VELAMOOR: Well, your Honor, we would strongly  
11 request that the Court set the June date. I think that is  
12 entirely consistent with the Court's schedule. It sounds like  
13 the last date you're setting, the Court was setting for the  
14 procedure was April 21<sup>st</sup>. I think we'll be able to narrow  
15 down these issues even before that, but even to the extent it  
16 runs to that schedule, they should have plenty of time to work  
17 through their issues before June, the date in June. I would  
18 note that at that point that would be well over a year since  
19 the initial indictment in this case.

20                  THE COURT: Let me hear from defense counsel.

21                  MR. AGNIFILO: Could we just talk?

22                  THE COURT: Yes.

23                  MR. AGNIFILO: Thank you, Judge. Thank you.

24                  (Defense counsel conferring)

25                  MR. GINSBERG: There are certain scheduling problems,

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1 but given what your Honor has decided to do today, I think it  
2 would behoove us not to push this further. So the real  
3 problems come in the June-July period. Mr. Bath has two trials  
4 and Mr. Agnifilo has a trial.

5 MR. AGNIFILO: I have a trial in front of Judge  
6 Matsumoto in United States v. Martin Shkreli, June 26<sup>th</sup>.

7 THE COURT: Who else has a conflict on the June date?

8 MR. BATH: Your Honor, I've got trials set, rape  
9 trials, for July 18<sup>th</sup> and July 31<sup>st</sup>, two separate trials.  
10 I've also got a family vacation I prepaid for just last week in  
11 late June and is paid. But even if I could get out of that  
12 family vacation, those two rape trials got set then because of  
13 this trial.

14 THE COURT: Where are they pending?

15 MR. BATH: One's pending in -- they're both state  
16 cases, Judge. One's in Franklin County, Kansas, and one is in  
17 Douglas County, Kansas. One's a juvenile case, one's an adult  
18 case. It's possible I could go in and ask them to move those  
19 forward. I mean, like Mr. Ginsberg, I'm not shy, but I've  
20 tried two jury trials this year, both over a week already. I'm  
21 not shy about trying cases, Judge, but I had to tell those  
22 other courts that this was taking precedence.

23 THE COURT: Understood.

24 MR. GINSBERG: I think I can be available. I have two  
25 cases scheduled, but I think they're both going to plead out.

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1 And I think September I'll definitely be available and free.

2 Out of the other schedules, I think for us, that makes the most  
3 sense. I don't know Mr. Roth's schedule, but I don't think I  
4 can impose on your Honor waiting to hear from him. He'll I  
5 guess have to make himself available, and we have other  
6 counsel.

7 THE COURT: All right. September 11, 2017, at 10 a.m.  
8 And I'm going to have you back for a conference in this case on  
9 June 16<sup>th</sup> at 2:30.

10 MR. VELAMOOR: May I ask a question. If the  
11 government were to withdraw its crime-fraud motion, would  
12 that --

13 THE COURT: You know, I don't do business that way. A  
14 card laid is a card played. Mr. Velamoor, as the judge does  
15 this, you look at what you have in front of you. Now you want  
16 to play -- I think there's a name for it -- Jenga is the name  
17 of it, where you pull one piece out and see what happens,  
18 whether the tower collapses or not. I gave you an opportunity.  
19 I really did.

20 MR. VELAMOOR: Certainly.

21 THE COURT: All right. So that's what it is. It's  
22 September 11<sup>th</sup> at 10 a.m.

23 And I'll hear the government's application.

24 MR. VELAMOOR: Yes, your Honor. We'd move to exclude  
25 time between today and the new trial date for the parties to

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1 prepare for trial on that date.

2 MR. GINSBERG: No objection from the defense,  
3 defendant Tucker, your Honor.

4 MR. BATH: No objection from Mr. Muir.

5 THE COURT: All right. I find that the ends of  
6 justice will be served by granting a continuance to  
7 September 11<sup>th</sup> and that the need for a continuance outweighs  
8 the best interests of the public and the defendants in a speedy  
9 trial. The reasons for my findings are strewn in the record of  
10 this proceeding, including the volume of the documents produced  
11 in discovery, the possible need for subpoenas in this case, and  
12 the pendency of a motion asserting the crime-fraud exception to  
13 the attorney-client privilege, and accordingly, the time  
14 between today and September 11, 2017 is excluded under the  
15 Speedy Trial Act.

16 Anything further from the government?

17 MR. VELAMOOR: Nothing from us.

18 THE COURT: All right. Anything further from the  
19 defendants?

20 MR. GINSBERG: No, your Honor. Thank you.

21 MR. BATH: Nothing. Thank you.

22 THE COURT: All right.

23 MR. GINSBERG: Good afternoon.

24 THE COURT: Thank you.

25 (Adjourned)